U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 29 October 2003

CASE NO.: 2002-LHC-2921

OWCP NO.: 8-120711

IN THE MATTER OF

RONALD LEWIS
Claimant

v.

HORIZON OFFSHORE CONTRACTORS, INC.
Employer

and

ALASKA NATIONAL INSURANCE COMPANY
Carrier

APPEARANCES:

Ed Barton, Esq.
Quentin Price, Esq.
For Claimant

Michael D. Murphy, Esq.
For Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Ronald E. Lewis

(Claimant) against Horizon Offshore Contractors, Inc., (Employer) and Alaska National Insurance Company (Carrier). The formal hearing was conducted in Beaumont, Texas on May 20, 2003. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-26 and Employer's Exhibits 1-38 This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on September 6, 2001;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on September 6, 2001;
5. A Notice of Controversion was filed February 23, 2002; March 8, 2002; April 10, 2002; and May 7, 2002;
6. An informal conference was held on, July 8, 2002;
8. Temporary total disability and temporary partial disability is disputed;
9. Employer paid Claimant benefits from November 1, 2001 to March 4, 2002 (37 $^{3/7}$ weeks) at $373.33 per week. Total benefits paid are $16,026.61; and
9. Some medical benefits have been paid.

Issues

The unresolved issues in this proceeding are:
1. Nature and Extent of Disability;
2. Section 7 Medical Expenses;
3. Average Weekly Wage; and
4. Attorney's fees and expenses.

[1] The parties were granted time post hearing to file briefs. This time was extended up to and through September 5, 2003.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

Statement of the Evidence

Testimonial and Non-Medical Evidence

Claimant, age 44 at the time of the formal hearing, has lived in Longville, Louisiana, 30 miles north of Lake Charles, Louisiana, for 17 years. He was a member of the United States Marine Corps for 2 years and was honorably discharged. It was while Claimant was serving in the Marines that he first suffered a lower back injury (TR 23). Following his discharge from the Marines, Claimant primarily worked in outdoor construction. Claimant explained that reductions in force were common, but he made as much money as he could every year (TR 98). In further explaining how he worked, Claimant said he worked seven days a week, 12 hours a day for months, and then he would "take off and rest a little bit," and then find another job (TR 103). However, Claimant explained that due to his current injuries he is no longer able to perform his former employment, and is unable to stand or sit for long periods of time due to leg and back pain (TR 25). Claimant also suffers from some pre-existing psychological problems, as a result of his timed served in the Marines, in tandem with a chemical imbalance. Claimant is treated pharmaceutically with Effexor and Xanax for anxiety and depression (TR 26-27).

On September 6, 2001, Claimant was working as a crane operator for Employer. He was in the process of assisting in the rigging of his crane when an angle iron, which he used to pry some heavy steel apart, slipped and cut his leg to the bone.[3] Claimant was taken directly from the work site to Doctor's Hospital, where his leg was stapled 27 times by Dr. John King. Claimant followed up with Dr. King throughout October (October 16, October 23, and October 30, 2001) and was eventually treated for cellulites of the left anterior leg, secondary to the poorly healing leg wound (CX 4, p.13-15). Claimant has neither worked, nor looked for work, since the accident (TR 62). March 1, 2002, Claimant's benefits were terminated.

Claimant's leg did not heal promptly, and by November 2001, Claimant's wound was infected. On November 16, 2001, he visited the emergency room at Lake Charles Memorial Hospital. Joan Flynn, a wound care specialist, treated Claimant (CX 4, p. 22). Ms. Flynn referred Claimant to Dr. Nabours who then

[3] Claimant also contends that when he was hit by the angle iron he was thrown to the ground. However, there is no corroboration of that version of the events, and the first time Claimant mentioned the fall was to Dr. Nabours in December 2002, over a year after the event (CX 3, p. 4, TR 65). Lewis French who was the first medical personnel at the event corroborated Claimant's telling of the events of the accident, however, made no mention of Claimant being knocked to the ground (CX 16, p. 3)

referred Claimant to Dr. Cohen, an orthopedist, who saw Claimant on November 27, 2001, and then according to Claimant referred him to Dr. Gorin, a pain specialist, who treated Claimant beginning on December 18, 2001, through March 2002, when treatment was denied authorization.[4] Throughout his treatment with Dr. Gorin, Claimant was restricted from work. Dr. England began treating Claimant on May 13, 2002, prescribing a combination of Oxycotin, Vicodin, Xanax, and providing Cortisone injections during office visits (TR 50). Dr. Nabours, Claimant's family doctor, referred Claimant to Dr. Raggio, who referred Claimant back to Dr. Gorin (TR 51-52). Employer requested that Claimant see Dr. Bernauer, who found that Claimant had no disability and could return to work at full duty status as of January 31, 2002.

Claimant explained in deposition testimony, as well as to Mr. Jeff Peterson during a vocational rehabilitation interview, that he is still able, on pain medication, to perform tasks such as handling 50 lbs. of feed for his animals, using lawn care equipment like a weed-eater, climbing a ladder to the roof to perform repairs, and hunt deer from the ground (not on a deer stand) (TR 69). Claimant also assisted his brother in building a fence in the summer of 2002 (TR 81), in spite of his explanation that by March 2002 he was aware of lower back pain (TR 82). In the month following, on April 4, 2002, when Claimant filed his LS-203 he made no claim for a back injury (TR 82, CX 2, p. 5).

The last recorded refill of Claimant's prescription pain medication was February 19, 2002 (CX 3, p 10), and it was not refilled again until May 13, 2002 (CX 2, p. 11). In the interim, Claimant visited the emergency room and complained that he had been "out of pain meds for a week." In light of that testimony, Employer recorded, by way of video surveillance, Claimant functioning without the benefit of pain medication, however, ostensibly still laboring with his injuries.

This video surveillance of Claimant was filmed over several days between March 20, 2002 and June 1, 2002. Claimant explained during the formal hearing that during the period of time he was not receiving authorized pain medication he had been taking his wife's pain medication that had been prescribed for her sciatic nerve condition (TR 91). On March 20, 2002, Claimant was filmed moving slowly and painfully into the office of Mr. Jeff Peterson, the vocational rehabilitation expert, however, an hour later he moved noticeably more quickly and smoothly. On May 3-4, 2002, Claimant was seen moving easily, without any limp or any use

[4] Employer argues that Dr. Cohen never referred Claimant to Dr. Gorin, however, initially Dr. Gorin's treatment was authorized (TR 95)

of a cane. Then on June 1, 2002, Claimant was recorded at a tire store, lifting and bending with apparent ease.

Claimant expressed a desire, at the formal hearing, to discontinue his narcotic pain medication, in spite of the fact that he stated his back and testicles hurt constantly (TR 107, ll 18-20). Claimant testified that "everybody's" told him to get off of the medicine (referring to Oxycotin), and he agreed. He stated that he had been admitted to the hospital twice, secondary to Oxycotin use (TR 106). He feels that Oxycotin, as a drug, should be taken off the market (TR 106).

Employer's Exhibit 38 is the deposition of Wallace Stanfill, a vocational rehabilitation counselor, whose report is Employer's Exhibit 28. On April 30, 2003, Mr. Stanfill produced an initial rehabilitation assessment and Labor Market Survey. Since then, he reviewed Dr. David Baskin's report of June 13, 2003, as well as the accompanying deposition, and the report and deposition of Dr. Steven Sacks. Based on the additional information, Mr. Wallace adjusted the number and type of jobs which were suitable and available to Claimant. The jobs which were available to Claimant between February 3, 2002 and March 10, 2002 were the following: a cashier at Ellis Pottery in Beaumont, TX earning $6/hr; a shipping receiving inspector for Howell's Furniture Warehouse in Beaumont, TX, earning $6.75 for 20-25 hrs/ week; a cashier at Al Cook's Nursery & Landscaping in Beaumont, TX, earning $5.50./hr; a part-time cashier at McCoy's Hardware in Port Arthur, TX, earning $5.75/hr.; a shuttle bus driver for Delta Downs in Vinton, LA, earning $7/hr.; and a part-time tele-recruiter at Lifeshare Blood Center in Beaumont, TX, earning $6/hr.

Mr. Stanfill also did a Labor Market Survey for jobs available on April 30, 2003 including; a part-time bus driver for Tekoa Academy in Port Arthur, Texas, earning $8/hr.; a cashier at Rayburn Tackle in Rayburn, TX, earning $5.50/hr.; a bindery helper and delivery driver for Sprint Printing in Beaumont, TX, earning $6.50/hr.; and a front desk clerk trainee at Holiday Inn Express in Orange, TX, earning $5.50 for 30 hrs/week.

Mr. Stanfill agreed that most employers would expect an employee be in regular attendance (EX 38, p. 19-23). Also, any employer who learned of Claimant's dependence and use of heavy narcotics would be very leery of hiring him, especially when his tasks included driving (EX 38, p. 35, 37). Mr. Stanfill also noted Claimant's previous work experience with Repcon, Inc., in Big Springs, TX beginning January 10, 2000 (EX 26, p. 23), and with Becon Construction in Port Arthur, TX, from July 1999-Septemeber 1999 (EX 26, p. 37), earning $17.25

an hour (total wages of $4,998.96) as a journeyman structural iron worker (CX 10, p.3).

Claimant's Exhibits 12 & 19 contain the wage information of three of Employer's crane operators; Rick Beard, Ken Bergeron, and Gary Greer. In the year preceding Claimant's accident, between September 19, 2000 and September 11, 2001, Mr. Beard earned $47, 383, Mr. Bergeron earned $48,793, and Mr. Greer earned $40, 947.

Claimant's Exhibit 13 is the itemized earning statement of Claimant and Claimant's Exhibit 14 is Claimant's tax forms from 1997, 2000, and 2001. Based on the information provided, Claimant earned $22, 055.53 in 1997, $29, 643.02 in 1998, $24,661.88 in 1999, $35, 805.62 in 2000, and $35,600.94 in 2001, which included income earned from benefits following the injury.[5]

Claimant's Exhibit 17 is the report of Jeffrey Peterson, a vocational rehabilitation specialist, who interviewed Claimant on June 27, 2002. He authored a report dated July 11, 2002. When he met with Claimant at his office he noted a slight limp, however, he observed that Claimant did not appear to have a mobility problem. Since no functional limitations had been assigned by doctors he was unable at that time to evaluate Claimant (CX 17, p. 8).

Medical Evidence

Following the accident, Claimant was treated by a number of doctors. He was initially treated by Dr. John King and then readmitted to the hospital to be treated by wound specialist Joan Flynn, who eventually recommended he see Dr Carl Nabours, Claimant's family physician, who then recommend Dr. Nathan Cohen. Claimant also saw Dr. Kevin Gorin and then Dr. Richard England for pain management. Dr. R. Dale Bernauer, Dr. John Raggio, Dr. Steven Sacks, and Dr. David Baskin examined Claimant to evaluate his medical condition. Dr. David Steiner examined Claimant for his social security claim.

Dr. Nabours noted on November 13, 2001 that Claimant called and stated that he needed to have a surgeon look at his leg (EX 8). Dr. Nabours responded

[5] Claimant worked for Repcon, Inc in 2001 and 2002, S&B Engineers & Constructors in 2001 and 2002, Performance Contractors in 2000, Horizon Offshore in 2001, and Zachary Construction in 2000 (CX 13). In 1997, Claimant worked for International Maintenance Corp., Harmony Corp., Tidewater Construction, and I.M.T.C, Inc .(CX 14). Claimant worked for H.B. Zachary Co., from July 14, 1999 to March 20, 2000. He earned $8, 228 in 2000 and $23,693.39 in 1999.

that Claimant would either have to come into the office or see Dr. Cohen. Claimant instead reported to the emergency room several days later. Based on the documentary evidence provided, Dr. Nabours examined Claimant for this particular injury on December 30, 2002 (CX 3, p. 4). In Claimant's history he mentioned having been knocked to the ground by the angle iron. Claimant also told Dr. Nabours that he wanted a referral to a neurosurgeon, and that he had chronic pain in his back. Dr. Nabours referred Claimant to various physicians, including neurosurgeon Dr. Raggio and orthopedist Dr. Cohen, and he scheduled Claimant's MRI on January 8, 2003 (EX 8, p. 7).

Dr. Nathan Cohen, an orthopedist, examined Claimant on November 27, 2001, referred by Worker's Compensation, and found Claimant had normal muscles in his hamstrings and quadriceps, no swelling, a normal muscle bulk, and a normal gait, which if Claimant was bed ridden should not have been evident (CX 4, p. 10, EX 22, p. 42). Dr. Cohen did not report a "fall" in his history of Claimant's accident. Dr. Cohen diagnosed Claimant with a soft tissue injury to his left lower leg, and recommended conservative/non-operative treatment (CX 4, p. 11). On March 26, 2002, Dr. Cohen, in a letter addressed to Judith Lee, the claims examiner, explained that he had only examined Claimant once, and determined that Claimant would have been able to return to work at that time if protection to the soft tissue injury could be afforded. Thereafter he received a correspondence from Dr. Gorin, whom he did not refer Claimant to, and he had not seen Claimant since the initial evaluation. He stated that he did not disagree with any of the statements in Dr. Bernauer's January 31, 2002, narrative (CX 5, p.4).

Dr. R. Dale Bernauer saw Claimant at the behest of Employer/Carrier on January 30, 2002, and completed his report on January 31, 2002. Claimant did not report a "fall" in his self-described history of the accident to Dr. Bernauer (CX 4, p. 1). Claimant completed a questionnaire in which he noted that he was experiencing burning in his lower left leg, as well as increasing numbness in his leg and foot (CX 4, p. 3). When asked if he was experiencing low back pain, Claimant answered "no." (CX 4, p. 3). After physically examining Claimant, Dr. Bernauer reported that Claimant had a well-healed scar, with some darkness to the skin around the wound, no orthopedic disability in his foot, and that he suffered strictly from a cosmetic deformity.[6] He further surmised that Claimant could return to work with no restrictions (CX 5, p. 9, CX 4, p. 6). Dr. Bernauer's report does not address Claimant's complaints of pain.

[6] There is no documentary evidence of the notes taken during the physical examination of Claimant, or the extent of Dr. Bernauer's exam. He reported Claimant's grip strength, height/weight, pulse and blood pressure, noting the accident and that there had been no fracture, but nothing further.

Claimant saw Dr. Bernauer again on March 6, 2002 (EX 13, p.3). After examining Claimant, Dr. Bernauer noted that he complained of left foot and toe pain, as well as numbness in both hands. Dr. Bernauer's treatment plan was to order an EMG of both hands as well as the left leg to further investigate the current condition, and make a determination as to his continued care. A follow-up appointment was scheduled for April 17, 2002, however, Claimant never returned to Dr. Bernauer.

Dr. Kevin Gorin is board certified in rehabilitation, psychical medicine, and pain medicine (CX 8, p. 17-21). Dr. Gorin initially saw Claimant on December 18, 2001, citing a referral by Dr. Nathan Cohen. In his physical examination, Dr. Gorin found Claimant's motor function to be generally within normal limits without obvious motor deficiency, as well as decreased sensation which most closely approximated a superficial peroneal nerve distribution. Consequently, Dr. Gorin diagnosed Claimant with possible left lower extremity complex regional pain syndrome, a slowly healing left lower extremity wound, and a developing adjustment disorder to his disability (CX 8, p. 20). By way of treatment, he prescribed Oxycotin, 20 mg every 8 hours for severe pain, Zanaflex for muscle spasms, and Neurontin for neuropathic pain. He felt at that time that Claimant was unfit for his former job, and opined that, based on the need for foot stomping while operating the crane, Claimant would never be able to return to his former job. He anticipated Claimant returning to light medium work. Claimant's prescriptions were refilled January 10, 2002 (CX 8, p 14).

Dr. Gorin examined Claimant again on February 1, 2002 (CX 5, p. 7). In Dr. Gorin's February 2, 2002, letter to Dr. Nathan Cohen, he noted that Claimant experienced some pain and numbness on the anterior surface of his left ankle, further noting that his wound was not completely healed, but that it was doing better than previously. Claimant also complained of some tingling between the first, second, and third toes of the left foot. On physical examination, there was no obvious evidence of infection and behaviorally Claimant remained appropriate and his gait appeared normal, however, Dr. Gorin noted some level of hyperesthesia medially along the left foot. Dr. Gorin then prescribed Claimant 20 mg. of Oxycotin to be taken every 8 hours for severe pain, Zanaflex 2 mg every eight hours for muscle spasm, and Neurontin 600 mg three times a day for neuropathic pain. He reiterated that Claimant remained totally temporary disabled, not having reached maximum medical improvement; however, he anticipated that Claimant could be at light medium duty level after a bit of physical therapy (CX 8, p 18, CX 5, p. 8, EX 11).

On March 1, 2002, Claimant's benefits were discontinued based on Dr. Bernauer's report, and as such, Claimant was not authorized to see Dr. Gorin. However, after some correspondence between attorneys it was determined that Claimant could return to Dr. Gorin after the outstanding balance had been paid. Employer/Carrier never paid the outstanding balance, and Claimant was never examined by Dr. Gorin again.[7]

Dr. David Baskin is a professor of neurosurgery at Baylor College of Medicine, as well as having an active clinical practice through which he operates on approximately 250-350 patients a year. Dr. Baskin examined Claimant on June 13, 2002, and his deposition is Employer's Exhibit 22. Dr. Baskin noted that the MRI scan was not available when he initially did his report. Dr. Baskin would not recommend pain management and did not believe that Claimant has an on-going "organic" disease (EX 22, p. 8). However, he did feel that Claimant would benefit from brief psychiatric counseling, explaining that Oxycotin is a powerful narcotic. Furthermore, Dr. Baskin was concerned as to what effect 80 mg of Oxycotin would have on Claimant's reaction time, and could therefore be a safety concern on the job (EX 22, p. 9). He remarked that he felt Claimant could perform a non-industrial job on a full-time basis, even with the Oxycotin.

Dr. Baskin was unequivocal in his opinion that Claimant back condition was unrelated to his work-place accident, based on the inconsistent complaints of pain (EX 22, p 11, l.12). Notably, when Claimant walked into Dr. Baskin's office, and during the exam, he observed "a much exaggerated limp" and a peculiar gait; however, when Claimant walked out of the office, Dr. Baskin observed him through the waiting room window and Claimant was walking normally (EX 22, p. 13, ll.12-17). During the examination, Dr. Baskin lightly touched the skin on Claimant's back, barely making contact with the skin, and Claimant jumped, which Dr. Baskin noted is not a physical response. As further evidence, Dr. Baskin stated that there was an inconsistent response to Claimant's muscle test, inconsistent responses to numbness testing[8] and leg raising suggested non-organic disease (EX 22, p. 14-15). Dr. Baskin agreed with Dr. Steiner that the back complaints did not fit with the expectations of a normal back complaint, indicating that the complaints have some sort of psychological motivation.

[7] Carrier authorized treatment by Dr. Gorin for Claimant's leg on March 15, 2002 (CX 8, p. 29, CX 21, p.3). However, on March 20, 2002, when asked to verify that the bill would be paid, the claims adjuster, Ms. Judith Lee, told the doctor's office that she would advise Claimant to find a doctor who cared more about patient's treatment and less about money, but she gave "her word" to pay the balance (CX 8, p. 34, *see also* CX 21, p. 6).

[8] Dr. Baskin explained that people who have numbness from a nerve injury have a very precise and defined strip of numbness, however, Claimant's was not in the same place each time he was tested.

Dr. Baskin agreed that Claimant had some symptoms of RSD, however, he also felt confident that Claimant did not have RSD in his lower leg. The pigmentation change in Claimant's leg was due to the traumatic injury, a dermatological change, as oppose to the fluctuation of blue and red which is a symptom of RSD. Dr. Baskin opined that none of Claimant's current medication was reasonable or necessary to treat his leg laceration, not even the Oxycotin or Vicodin (EX 22, p. 20). He explained the very serious side effects of Oxycotin, which include, but are not limited to, drowsiness, reduced reaction time, liver/kidney toxicity, respiratory depress, drug abuse, dependency, and constipation (EX 22, p. 33). He would, therefore, be concerned about any individual operating a crane while taking high dosages of Oxycotin (EX 22, p. 36). Dr. Baskin's further explained that Claimant may need professional help to discontinue his current pain medication, suggesting a psychiatrist or psychologist.

In addressing restrictions, Dr. Baskin stated that regardless of the source of Claimant's back condition, he would assign no restrictions. Furthermore, Dr. Baskin stated that there was no aggravation of the back injury, namely because the problems Claimant currently reports are identical to the problems that he reported before the September 2001 accident (EX 22, p. 23). There is no indication that Claimant suffers from altered gait syndrome, or that he developed any other injuries in response to his lacerated leg (EX 22, p. 24).

During his deposition, on cross-examination, Dr. Baskin testified that any advice given to Claimant to avoid walking on his leg following the suture of the wound would have been bad advice. The best recommendation for a leg wound is to continue to use the leg in an effort to avoid cellulitis or phlebitis (EX 22, p. 25-27). However, if Claimant had spent September through December basically incapacitated, he could have developed back problems, which may have been over-looked by doctors focusing on the more immediate leg injury (EX 22, p. 29). Dr. Baskin explained that Claimant's MRI showed that he has two bulging discs in his lower back, as well as a history of intermittent back discomfort, however, he felt that this abnormality in the MRI and Claimant's history demonstrate a pre-existing back problem, not an indication of an aggravation or a new problem. He felt sure that the back problems Claimant experienced were not related to the September 2001 incident (EX 22, p. 35). Dr. Baskin felt that Claimant suffered only a soft-tissue injury to his lower left leg (EX 22, p. 41).

Dr. Steven Sacks is a clinical fellow of the American Academy of pain. His deposition is Employer's Exhibit 23. Dr. Sacks reviewed the video surveillance evidence shortly before he was deposed, and consequently revised some of the

opinions that were contained in his initial report.[9] Dr. Sacks testified that his findings of SI joint dysfunction and lumbar radiculopathy would be dramatically discounted. Claimant appeared extraordinarily impaired, almost paralytic, when he was examined in Dr. Sacks' office. After viewing the video, and considering the exam, Dr. Sacks felt Claimant may have some pathology present, but certainly not to the extent presented. Dr. Sacks further stated that Claimant's gait in the video was too good to suggest the presence of a severe lumbar injury (EX 23, pp19-20).

Dr. Sacks testified that the laceration in the leg would result in some numbness in the toes; however, there was no arthrosis present in the knee, ankle or foot. He further stated that even with Oxycotin there would not have been that dramatic a difference (EX 23, p. 11). Due to the radically different portrayals, Dr. Sacks agreed with Dr. Baskin that Claimant should have a psychological evaluation. Dr. Sacks agreed that if Claimant was taking up to 80 mg of Oxycotin a day, then he would need to be de-toxified by a medical professional to discontinue the use of Oxycotin (EX 23, p. 13, 20). In further explanation, Dr. Sacks stated that if Claimant had a history of emotional instability, it would be reasonable to offer counseling to Claimant in the process of weaning a narcotic like Oxycotin (EX 23, p. 14, ll 12-15). Dr. Sacks opined that with the level of Oxycotin Claimant was currently prescribed he would be unable to work as a crane operator (EX 23, p. 18, l. 22). However, he further remarked based on the strong symptoms of magnification, he would not offer Claimant medication(EX 23, p. 19).

In reference to Claimant's lumbar injury, Dr. Sacks felt confident saying that if there was no direct impact to the spine, then the injury was not causally related (EX 23, p 20). Dr. Sacks was also skeptical of giving credence to Claimant's claims of radiculopathy (EX 23, p. 25), and he was unconvinced that Claimant had any profound injury to his lower back; however, he surmised that Claimant could have chronic SI joint problems unrelated to the September 2001 accident. Dr. Sacks explained that if Claimant did not in fact fall, then the lower back pain was unrelated (EX 23, p. 25). And even if Claimant did fall in September 2001, prior back complaints lessened the credence as to causation, and since he misrepresented his limitations in the first place, Dr. Sacks wondered as to the value of the history in general (EX 23, pp 27, 32). Dr. Sacks was hesitant, based on his limited involvement with Claimant and using the information he did have, to suggest more intervention, namely pain management.

[9] In fact, Dr. Sacks stated that his perception of Claimant was "substantially changed" and that "he no longer feels comfortable with the initial report." (EX 23, pp 7-8). Dr. Sacks said, "I have to be honest and I have to make clear that that videotape was extremely convincing to me and very worrisome, very disturbing." (EX 23, p. 11, ll 14-16)

Dr. England's records are part of Claimant's Exhibit 9 and Employer's Exhibit 14.[10] Dr. England began seeing Claimant on May 13, 2002, and saw him monthly through May 2003.[11] Dr. England was responsible for refilling Claimant's prescriptions after he had been denied treatment with Dr. Gorin. On January 6, 2003, Dr. England encouraged Claimant to see a neurosurgeon, after hearing that Claimant had aggravated his injuries while helping his brother build a fence. At the formal hearing, Claimant explained that Dr. England was the doctor who would prescribe his pain medication and the walking cane (TR 103, CX 3, p. 11).

Dr. John Raggio, a board certified neurosurgeon, examined Claimant on January 22, 2003. His records are Claimant's Exhibit 3 and Employer's Exhibit 36. Dr. Raggio's report, dated January 23, 2003, noted Claimant's complaints of low back pain with radiation to the left foot. He also noted that the five month "lag between" lumbar symptoms and the injury itself make it highly unlikely the two were related (CX 3, p. 6, EX 36, p.5). Dr. Raggio read the MRI of Claimant's lumbar spine as normal. He also noted that Claimant had a marked over-reaction during testing, and that Waddell tests were positive for inappropriate descriptions of symptoms in six out of seven categories. In conclusion, Dr. Raggio remarked that Claimant had a maximum of symptoms and an exam which was equivocal. He felt there were strong signs of illness behavior according to the protocol of Waddell, and therefore, recommended an exercise program, an MRI of the lumbar spine, and a follow up appointment (CX 3, p. 7).

On February 19, 2003, Dr. Raggio reviewed the MRI of Claimant's lumbar spine and determined the there were some mild bilateral disc abnormalities; however, the examination was non-localizing. Claimant had a marked preponderance of psychological symptoms, and Dr. Raggio reiterated that the reporting of symptoms was remote in time from the accident, which would suggest a lack of relationship. Dr. Raggio ultimately referred Claimant to pain management (CX 3, p. 1, EX 36, p. 7).

Dr. David Steiner examined Claimant for the purposes of a claim for social security income, on January 24, 2003 (EX 11). In Claimant's history of the accident there was no mention of him being knocked to the ground, or falling.

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[10] Dr. England's notes were virtually illegible, and therefore, provide little insight into exactly what condition he was prescribing the narcotic pain medication for, or his opinion on Claimant's disability. Based on what could be gleaned from the notes, he saw Claimant strictly to refill his prescriptions.

[11] The dates of the visits are as follows: June 3, 2002, July 10, 2002, August 23, 2002, September 9, 2002, October 9, 2002, November 8, 2002, December 6, 2002, January 6, 2003, February 5, 2003, and March 5, 2003.

Based on the physical examination, it was Dr. Steiner's impression that Claimant showed Lumbar Syndrome which was the result of a mild degenerative disc disease at level L4-5. He also noted in his impressions, paresthesia in the left lower extremity secondary to trauma, complex regional pain syndrome (RSD) in the left lower extremity, and finally a psychological reaction. Dr. Steiner wrote that in observing Claimant's gait, and the way he acted throughout the exam, it appeared that some of the above impressions were contrived and self limiting or psychologically motivated. Dr. Steiner stated that he thought Claimant had a significant problem with his lower left extremity, but despite the dystrophic changes he expected that Claimant would still have a fairly good gait. Further, he felt that the back symptoms of which Claimant complained did not "fit" with what he would expect to see with a usual back problem (EX 11, p. 5).

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier,* 332 F.3d 283 (5th Cir 2003), *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on September 6, 2001, during the course and scope of Claimant's employment. I find that harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties' stipulation. Claimant clearly injured his leg while rigging a crane. The extent, duration and disabling effects of that injury, however, are in issue.

Claimant also alleges that he sustained a injury to his lumbar spine as a result of the September 6, 2001, accident. Claimant's MRI of the lumbar spine identified mild to moderate degenerative disc disease at level L4-5. Dr. Sacks stated that if Claimant fell at the injury site, then his back condition could be related. In addition, Claimant states that he was bed ridden for months due to his leg wound, and Dr. Baskin agreed that a fall could aggravate a pre-existing back condition, from which Claimant suffered, or that during his convalescence his back could have stiffened (EX 22, p. 27-28). I find, therefore, that Claimant has presented enough evidence to support that he suffered a spinal injury and that there were work related conditions which could have caused the injuries. The burden shifts to Employer to rebut the presumption invoked by Claimant's *prima facie* case.

As explained at the formal hearing, no doctor has explicitly connected this back injury to Claimant's accident (TR 115). The medical opinion of Dr. Sacks is conditional: if Claimant did not fall then his back is not related. Dr. Baskin felt that Claimant's back complaints were not related, and Dr. Raggio felt that due to the lag between the injury and the complaints that the back symptoms and the pain were unrelated. Dr. Steiner stated that the back symptoms did not "fit" a normal back problem, and that Claimant's symptoms were contrived, self-limiting, and psychologically motivated (EX 11, p. 5). Therefore, only Claimant contends that he in fact fell to the ground on September 6, 2001. His statement of the accident is uncorroborated, and he failed to mention being knocked to the ground in any retelling of the event until almost a year after the injury. Claimant's credibility has been weakened by the surveillance video, and has been independently questioned

by several doctors. The absence of a "fall" appearing in Claimant's retelling of the event, and the opinions of the vast majority of doctors that the back symptoms are exaggerated and/or unrelated, as well as the positive Waddell testing determined by Dr. Raggio, and Dr. Sacks repudiation of his original report in light of the video footage, are sufficient to rebut the presumption of causation.

In weighing the evidence, I find that the evidence presented by Employer far outweighs the evidence offered by Claimant. Claimant failed to mention being knocked to the ground by the rogue angle iron for almost a year following his injury. Although he claims to have been bed-ridden due to his leg wound, no doctor found evidence of muscle atrophy which would indicate that Claimant had failed to use his muscles and had been restricted to a bed unable to walk or move. Therefore, neither situation presented, that Claimant injured his back when he fell or that his back stiffened during a prolonged recovery, seem plausible. Furthermore, Claimant's credibility is weak at best, and in light of no supporting medical opinion from any of the multitude of doctors who examined and treated Claimant, I find that Claimant's degenerative disc disease in his lumbar spine was not caused or aggravated by his work place accident on September 6, 2001, but rather was a pre-existing condition not effected by this event.

Dr. Sacks and Dr. Baskin, however, both identified a further problem from which Claimant suffers, and therefore needs treatment: inappropriate pain behavior related to chemical dependency on narcotic pain medication.[12] Claimant was prescribed the narcotic pain medication Oxycotin for treatment of his infected traumatic leg wound. Dr. Gorin and Dr. England prescribed 80 mg of Oxycotin a day for Claimant's pain, which was initially solely related to his infected leg wound and the healing process. Dr. England continued to prescribe the pain medication after Carrier refused to authorize further treatment with Dr. Gorin. Dr. England's medical notes are virtually illegible and it is therefore not clear why he continued to prescribe the Oxycotin, Vicodin, and other various pain medications from May 2002 through March 2003, or by whom Claimant was referred (EX 9, p. 2)[13]. However, in spite of the reason Dr. England continued to prescribe the narcotics, it is evident that the narcotics were initially prescribed for Claimant's leg injury, which is causally related to his September 6, 2001, accident; and therefore, any problem which has resulted from Claimant's continued dependency on

[12] Dr. Gorin also opined that Claimant was having a psychological problem adjusting to his disability, which had manifested itself as an adjustment disorder. Dr. Sacks and Dr. Baskin agreed that much of Claimant's pain behavior was non-organic and psychologically motivated.

[13] When Judith Lee refused to authorize Dr. Gorin, she mentioned that she would tell Claimant to seek another pain management physician, and shortly thereafter Dr. England began treating him.

Oxycotin is directly related to the pain generated by his leg injury. The injury which has been identified by Employer's doctors, namely a physical and potentially psychological dependency on Oxycotin, requires medical intervention. The use and resultant dependency on the drug is due to Claimant's leg wound, which has been found to be causally related to work place conditions.

The psychological disability which has arisen due to Claimant's ingestion of Oxycotin has met the requirements of section 20(a), and thereby invokes the presumption of causation. There has been no evidence offered to refute either Claimant's dependency, or disability, from his reliance on Oxycotin. Therefore, the *prima facie* case has been made, and the presumption that Claimant's traumatic leg injury and Oxycotin dependency with the resultant disabilities are related to the September 6, 2001, accident has been invoked and not rebutted.

In sum, I find that, based on the weight of the evidence, Claimant's complaints of lumbar pain are unrelated to his September 2001 accident, but that his leg injury and his narcotic drug dependency are related to the event.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Claimant argues that the chronic pain in his back and leg and the need for further pain management means that he has not reached MMI. Employer points to

the opinions of Dr. Sacks and Dr. Baskin to demonstrate that, other than the necessary psychological counseling to discontinue the narcotic pain medication, Claimant's accident related injuries have reached maximum medical improvement.

There is very little opinion either by the parties or the medical experts as to when Claimant's various conditions reached maximum medical improvement. Claimant's leg wound did not receive any direct treatment following his release from Joan Flynn in wound care at Lake Charles Memorial Hospital. However, Dr. Gorin did continue to treat the pain which resulted from Claimant's wound through March 2002, and thereafter the prescribing of pain medication for Claimant's leg was taken over by Dr. England. It is therefore, unclear at exactly what point Claimant's leg had completely healed; however, based on Dr. Gorin's notes it had not completely healed by February 1, 2002. And in March 2002, Dr. Bernauer recommended that Claimant have an EMG to resolve his condition. Clearly, Dr. Bernauer felt that Claimant would benefit from further diagnostic testing even in March 2002, despite his January 31, 2002, opinion that Claimant's injuries were resolved[14].

Notwithstanding Dr. Bernauer's first opinion that Claimant was able to return to full duty work on January 31, 2002, I find that Claimant had not reached maximum medical improvement and instead benefited from further medical treatment following January 31, 2002. Notably, Dr. Sacks and Dr. Baskin agree that Claimant's leg condition no longer requires heavy pain medication, as there is no orthopedic disability; however, he requires further treatment to *discontinue* the medication.[15]

Dr. Gorin also recommended physical therapy before Claimant could be returned to work, and Ms. Flynn had suggested a special stocking for Claimant's leg. Neither request was ever fulfilled. Therefore, Claimant continues to require treatment, in the form of the stockings recommended by Ms. Flynn for the pain arising from his leg, possibly physical therapy recommended by Dr. Gorin, and most importantly he now requires help to be weaned from the powerful narcotic pain medication which he has been taking for his leg pain. Because Claimant would benefit from further medical treatment, he has not reached MMI. Also, I

[14] Dr. Bernauer's failure to initially consider Claimant's pain and the effects of his prescription medications indicate that his examination was perfunctory. Therefore, I assign it less weight in the determination of medical facts. Furthermore, two months later, Dr. Bernauer was recommending further diagnostic tests in an effort to assess Claimant's complaints of pain.

[15] Claimant himself has expressed a desire to discontinue his narcotic pain medication, and although he complains of pain, apparently it must be a pain he is prepared to live with if he is expressing a desire to discontinue use of Oxycotin.

accept Drs. Sacks and Baskin's findings that Claimant continues to require medical treatment, and no disability rating has yet been assigned to Claimant's lower left extremity. Therefore, he has not reached maximum medical improvement for either his leg injury or pain medication dependency and has been, since the date of the accident, temporarily disabled.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

If an injury occurs to a body part specified in the statutory schedule, then the injured employee is limited to the permanent partial disability schedule of payment contained in Section 908 (c)(1) through (20). The rule that the scheduled benefits are exclusive in cases where the scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability was thoroughly discussed by the Supreme Court in *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 101 S. Ct. 509, 66 L. Ed. 446 (1980) (hereinafter "*PEPCO*"). However, a scheduled injury can give rise to permanent total disability pursuant to Section 908 (a) in an instance where the facts show that the injury prevents a claimant from engaging in the only employment for which he is qualified. *PEPCO*, 101 S. Ct. at 514 n. 17. Therefore, if Claimant establishes that he is totally disabled, the schedule becomes irrelevant. *Dugger v. Jacksonville Shipyards*, 8 BRBS 552 (1978), *aff'd*, 587 F.2d 197 (5th Cir. 1979).

Claimant's leg injury made him incapable of returning to his former employment, and in spite of Dr. Bernauer's release to full duty on January 31, 2002, I find that Claimant's leg injury had not healed sufficiently at that point to

warrant a full release. Relying on Dr. Gorin's evaluation and physical examination, as well as Dr. Bernauer's March 2002 report requesting an EMG for Claimant, I find Claimant required further examination and diagnostic tests before he could be released to any kind of work, and there is no indication from the other medical professionals that Claimant is or was able to return to his former employment as a crane operator, and Claimant has not been assigned restrictions in relation to his leg injury. Consequently, I find, through both Dr. Sacks' and Dr. Baskin's testimonies, that Claimant has shown that he is unable to return to his former employment.[16] Claimant's reliance on pain medication, as well as Dr. Gorin's opinion that the level of involvement of the foot, would make Claimant unable to return to that employment. He is unable to safely operate heavy machinery and consequently unable to perform his former employment as a crane operator. Claimant has therefore established a *prima facie* case for total disability. The burden is therefore shifted to Employer to prove Claimant is capable of suitable alternative employment.

In order to establish suitable alternative employment, an employer must show Claimant is capable of working, even if it is within certain medical restrictions, and there is work within those restrictions available to him. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977).

In this instance, I find that, contrary to Dr. Sacks assessment that Claimant could work full-time in a non-industrial setting (EX 23, p21), Claimant's current dependence on Oxycotin renders him unemployable. Both Dr. Sacks and Dr. Baskin testified that Oxycotin (80 mg/day) is for very severe pain, and would slow Claimant's reaction time (EX 22, p. 9). Mr. Stanfill identified several jobs which he felt Claimant was capable of performing even with his current reliance on narcotic pain medication. However, I find that Claimant's effort to discontinue his use of Oxycotin, as recommended by Drs. Baskin and Sacks, requires medical assistance and psychological counseling (EX 22, p. 36, Ex 23, p. 18). There was no opinion from either Mr. Stanfill or Dr. Baskin that Claimant would be able to return to work while *simultaneously* being weaned from narcotics. As stated by Mr. Stanfill, employers require consistent attendance by their employees, and Claimant's further need for treatment would make such consistent attendance either unlikely or impossible. Until Claimant has discontinued the use of

[16] Dr. Bernauer's examination was perfunctory, and in spite of Claimant's complaints of pain, which he did not give any credence to, as well as the unhealed leg wound, he released Claimant to full duty, which according to other doctors would have been premature.

unnecessary narcotics, there is no job which would be suitable for his current medical condition.

In sum, although I have no doubt that once Claimant is no longer under the influence of heavy narcotic pain medication he will be employable, in some capacity, he is currently totally disabled, and because of his dependence on pain medication is unable to perform any of the jobs identified by Mr. Stanfill in either his labor market survey of February 2002, or April 2003. Therefore, Claimant remains totally temporarily disabled until such time that he is no longer under the influence of heavy dosages of narcotic pain medication and can safely *and regularly* return to some type of employment.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'd* 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curium) *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983).

Claimant is seeking unpaid medical expenses, including reimbursement for doctors visits, specifically the balance owed to Dr. Gorin's office of $105.00. He also requests that the Ted's Stockings which have been recommended be authorized and paid for by Employer. Claimant also seeks authorized treatment for chronic leg pain, as well as back pain, and potentially psychological or psychiatric helping discontinuing narcotic pain medication. Claimant too emphasizes that his choice of physician, Dr. Gorin, who had been prescribing pain medication until Employer refused to authorize further visits, should be paid for by Employer.

I find that Claimant's leg injury, namely the traumatic wound to his lower left extremity, has healed. However, it appears he is still in need of treatment for the limb itself in the form of physical therapy. Also, as stated by Drs. Sacks and Baskin, Claimant needs medical treatment to discontinue the use of Oxycotin because of the high dosages and addictive nature of the drugs, and I find such treatment to be reasonable and necessary. I also agree that Claimant's request for Ted's Stockings, as recommended by Joan Flynn, is reasonable and necessary, and should be paid by Employer. Employer is further liable, as they agreed through various correspondences, to pay for the outstanding balance of Dr. Gorin's office, as such treatment was reasonable and necessary for the healing of Claimant's traumatic wound. Also, I find Dr. Gorin to be Claimant's choice of physician and Employer to be responsible for the treatment recommended by that physician as regards Claimant's leg.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v.*

Addison Crane Co., 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 week of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular") . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997)

In this instance, Claimant and Employer agree that 10(a) is an inappropriate means to calculate the average weekly wage. Claimant worked for Employer from August 15, 2001 to September 6, 2001, and before being hired by Employer had been unemployed for a period of time. He had not worked substantially the whole year, and therefore, 10(a) is inappropriate. Comparably, although Claimant explained that he requested records from Employer that would permit a 10(b) calculation such records were not forthcoming, and the co-employees records did

not contain sufficient information as to the weeks worked to make a 10(b) calculation. Therefore, the parties agree, albeit for different reasons, that there is not sufficient evidence for a 10(b) calculation.

In light of the above explanations, I agree with the arguments of the parties that 10(c) is the appropriate means by which to calculate Claimant's average weekly wage. Claimant urges that 10(c) be used and specifically that Claimant's wages while with Employer ($4,585.00, CX 20, p. 1) should be divided by the weeks he worked (3.142 weeks) for an average weekly wage of $1, 458.84. Alternatively, he argues that a similarly situated co-employee's wages be used to approximate Claimant's earning potential at the time of his injury. Claimant's Exhibits 12 and 19 contain co-employee information, specifically that of Ken Bergeron, Sr., Rick Beard, and Gary Green. Claimant assumed Ken Bergeron worked 52 weeks in the preceding year, and divided his total wages earned ($48, 793.79) by 52 to arrive at an average weekly wage of $938.34.

Employer, on the other hand, argues that Claimant's earnings from the preceding 4 years (1997-2000) be added together ($132, 864.91) and then divided by the number of years worked (4.6923) to arrive at an average yearly wage which would then be divided by 52 to arrive at an average weekly wage, $544.53 (CX 13). The "meager" pre-accident earnings from 2001 were not included due to Claimant's extensive unemployment

Section 10 (c) allows considerable latitude in determining a reasonable approximation of Claimant's wage earning capacity, and the primary concern is to determine a sum which reasonably represents the earning capacity of the injured employee at the time of the injury. *Miranda v. Excavation Constructions, Inc.*, 13 BRBS 882 (1981). During the formal hearing, Claimant confirmed that it is not unusual for him to work for several months, seven days a week for twelve hours a day, then quit the job and take time off (TR 103). Looking at Claimant's wage earning history confirmed his testimony, indicating that he rarely worked 52 weeks a year, and certainly not that long for the same Employer.[17] Therefore, I do not think that using the wages from one of his co-workers, who did indeed work 52 weeks, or the wages earned during his 4 weeks with Employer, would be a fair

[17] Although Claimant insists that he enjoyed working for Employer and intended to stay, his work history does not support his assertion. (TR 36-37). Claimant's own testimony at trial and his wage earning history indicates that he worked for months and then took time off, belying the claim that he would have worked 52 weeks a year for this Employer while earning approximately $1,000/week. It would therefore be an unfair windfall for Claimant to calculate his earning potential on the fiction that he would have worked consistently for this Employer, when he had only been employed for a month, and there is no evidence that he had a history of staying with an Employer 52 weeks, especially working 7 days a week, 12 hours a day.

estimation of Claimant's earning potential. I find instead that Claimant's annual wages from previous years is the best way to approximate his earning potential at the time of the injury. However, I disagree with Employer that it is necessary to calculate wages all the way back to 1997.

Claimant's wages from 2000 are a fair approximation of Claimant's wage earning potential. Claimant worked in comparable industries and was paid wages commensurate with the wages he earned with Employer. During 2000, Claimant worked from January through March, and then again from September through December. In 2001, Claimant worked in February and March, then was hired by Employer in August and was injured in September. Claimant voluntarily quit his employment with Repcon, Inc. in Texas shortly before the project was finished citing his displeasure at working nights and having been away from home for three months[18] (EX 26, p. 5). Therefore, in spite of the availability of work, and a respectable wage, Claimant voluntarily discontinued working and returned home to Louisiana, to remain unemployed for 5 months.

Claimant's job history indicates that he would not have stayed with Employer for 52 weeks a year, especially since, as indicated by the documentary evidence, it was important for him to return home to his family, and therefore, he had quit jobs in the past to "take off and rest a little bit" (TR 103). Consequently, it is not a fair estimate of Claimant's wage earning potential that he would have stayed in Texas to work 52 weeks a year, when he had not in the past, and as stated at the formal hearing that it was not his understanding of his work pattern.

In sum, it is not appropriate to use either a 52 week working co-worker, or the three weeks Claimant worked for Employer and multiply that wage by 52 weeks to find an annual wage, when Claimant did not typically work 52 weeks a year. Therefore, as a means of finding a fair average weekly wage, I used the wages Claimant earned in 2000, which was the most recent year for which there is adequate documentary evidence of wages earned and the amount of time worked, and divide that annual wage by 52 weeks, to arrive at an *average* weekly wage of $688.57.[19]

[18] Claimant had worked in Texas with S&B Engineers, Inc. towards the end of 2000 (September 8, 2000) and had been working for them for several months before he began working for Repcon, Inc., on February 7, 2001. Claimant left his employment February 11, two days before the project with Repcon, Inc., was expected to be finished.

[19] $35, 805. 62 divided by 52 equals $688.57.

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation on November 1, 2001, however Claimant had not lost any wages up to that point (CX 20, p. 4). Therefore, no § 14 (e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from September 6, 2001, until present and continuing, based on an average weekly wage of $688.57;

(2) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's injuries of September 6, 2001;

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer/Carrier shall have ten (10) days from receipt of the fee petition in which to file a response; and

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 29th day of October, 2003, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge